SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED ARTISTS TELEVISION, INC., *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Fortnightly Corporation asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on May 22, 1967.

OPINIONS BELOW

The opinion of the court of appeals is reported at 377 F.2d 872 and is annexed hereto as Appendix A, *infra* pp. 1-24. The opinion of the United States District Court for the Southern District of New York

is reported at 255 F. Supp. 177 (1966) and appears in the Joint Appendix[1] at pages 19-107.

JURISDICTION

The judgment of the court of appeals here sought to be reviewed (App. A, p. 25) was entered on May 22, 1967. An application for extension of time to file a petition for writ of certiorari was granted by this Court on July 21, 1967, extending such time until September 15, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

A community antenna television system (CATV)—of which more than 1,700 are now in operation in the United States, serving about 6,000,000 television viewers in more than 2,000,000 television homes—operates by receiving through an antenna the signals of a television broadcasting station and transmitting these signals through wires to the homes of members of the public who subscribe to the system, so that the programs broadcast by the station may be viewed by the subscribers on their own television sets. In this case the court of appeals has held that defendant's operation of two such CATV systems infringed the copyrights claimed by plaintiff on motion pictures and cartoons that were broadcast—under license from plaintiff—by the television stations whose signals the CATV sys-

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[1] The original record in the court of appeals has been certified to this Court and will be cited as "R". The Joint Appendix in the court below—ten copies of which have been provided to this Court in accordance with this Court's Rule 21, par. 4—will hereinafter be cited as "JA", and the Joint Exhibit Volume be cited as "JE".

tems received and transmitted to their subscribers. The questions presented on this petition are as follows:

1. Whether the activity of a CATV system such as defendant's in receiving and transmitting through wires the electromagnetic waves broadcast by a television station—without producing or handling the visual image or sound of television programs anywhere in the system—constitutes, within the meaning of sections 1(c) and 1(d) of the Copyright Act, a "performance" of motion pictures broadcast by that station under license from the copyright owner, and whether any such "performance" is "in public" within the meaning of the Act, so that the operation of such a system constitutes infringement of the copyright on such motion pictures.

2. Whether the court below, in imposing copyright infringment liability on CATV systems for their activity in assisting members of the public to receive television broadcasts that have been authorized by the copyright owner through a license to the broadcasting station, announces a rule contrary to the policies of the Copyright Act and the Communications Act.

3. Whether, when a copyrighted motion picture has been licensed by the copyright owner for broadcast by a television station, and when that station has been licensed under the Federal Communications Act to disseminate only such radio communications as are "intended to be received by the public", a homeowner has a right to receive that broadcast through a means he finds convenient, such as subscribing to a CATV system like defendant's, and whether that right is protected by a license implied in law under the Copyright Act and/or the Communications Act.

4. Whether the public's right to receive such a broadcast through subscribing to a CATV system like defendant's is at least protected from copyright-infringement liability where the subscribers served by the CATV system are located within the normal predicted service area of the broadcasting station as delineated by regulations of the Federal Communications Commission.

5. Whether the statutory monopoly granted by the Copyright Act should be judicially extended to hold CATV systems unqualifiedly liable for copyright infringement when those systems are being regulated by the F.C.C. under a regulatory scheme embodying the F.C.C.'s conception of the public interest under the Federal Communications Act, and when such an inflexible judicial rule would be inconsistent with that regulatory scheme and in conflict with one of its key elements.

STATUTES AND REGULATIONS INVOLVED

1. *Copyright Act.* Section 1(c) and (d) of the Copyright Act (17 U.S.C. §§ 1(c), (d)) provide as follows:

> "Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or

reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever; * * * "

2. *Communications Act of 1934; as amended.* Sections 1, 3(o), 303(c), (d) and (h), 307(b) and 325(a) (47 U.S.C. §§ 151, 153(o), 303(c), (d) and (h), 307(b) and 325(a)) provide as follows:

* * *

Sec. 151. "For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority hereto-

fore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is created a commission to be known as the 'Federal Communications Commission', which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this chapter."

* * *

Sec. 153(o). "'Broadcasting' means the dissemination of radio communication intended to be received by the public, directly or by the intermediary of relay stations."

* * *

Sec. 303. "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest or necessity requires, shall . . ."

* * *

(c). "Assign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate;"

* * *

(d). "Determine the location of classes of stations or individual stations;"

* * *

(h). "Have authority to establish areas or zones to be served by any station."

* * *

Sec. 307(b). "In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of

power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same."

* * *

Sec. 325(a). "No person within the jurisdiction of the United States shall knowingly utter or transmit, or cause to be uttered or transmitted, any false or fraudulent signal of distress, or communication relating thereto, nor shall any broadcasting station rebroadcast the program or any part thereof of another broadcasting station without the express authority of the originating station."

3. *Second Report and Order on CATV Regulation.* The F.C.C.'s regulatory scheme for CATV, is set forth in the lengthy and detailed *Second Report and Order, Community Antenna Television Systems* 2 F.C.C. 2d 725, 6 Pike & Fischer R.R. 2d 1717 (1966). It will hereinafter be cited as *Second Report and Order,* and copies as issued by the F.C.C. are submitted herewith for the convenience of the Court.

STATEMENT

This petition seeks review of the decision of the court of appeals holding that the operation of defendant's community antenna television (CATV) systems, in receiving signals broadcast by television stations and transmitting those signals over wires to the homes of subscribing members of the public, constituted a "public performance" by defendant of motion pictures broadcast by the television stations under license from the copyright owner, and hence constituted infringement of the copyright on those motion pictures. There are presently in the United States more than 1,700 community antenna systems serving

more than 2,000,000 television homes with about 6,000,000 viewers,[2] and the instant case is the first to adjudicate the claim that the operation of such a system constitutes copyright infringement. Necessarily included in the infringement question are such issues as whether the copyright owner may exact from members of the public who subscribe to CATV a second royalty for the right to view a broadcast for whose release to the public the copyright owner has already received one royalty from the broadcasting station: and whether the dispersed and rapidly growing CATV industry, which is already an important part of the national communications system and is being regulated as such by the F.C.C., is to be subject to the legal and economic control of the relatively few networks and other organizations that control the copyrights on television programs.

A. The Facts[3]

Defendant Fortnightly Corporation (petitioner here) owned and operated two CATV systems in and around the towns of Clarksburg and Fairmont, West Virginia. Plaintiff United Artists Television, Inc.

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[2] *Television Factbook* No. 37 (1967), Services Volume, p. 54a. *Second Report and Order*, ¶ 31.

[3] The statement of the facts herein has been drawn, to the fullest extent consistent with the desire for brevity, from the opinion of the court of appeals. Indented passages herein are quotations from that court's opinion.

As the court of appeals stated, "the facts concerning the operation of defendant's CATV systems are essentially undisputed, and the issue is whether, as a matter of law, defendant publicly performs telecast copyrighted motion pictures. Our review . . . is therefore not circumscribed by the 'clearly erroneous' standard." (App. A, p. 3, n.2).

(respondent here) claims copyright in certain motion pictures and cartoons which it authorized for public broadcast over five television stations. Three of the stations are located in Pittsburgh, Pennsylvania, and one each in Wheeling, West Virginia, and Steubenville, Ohio. Plaintiff brought this action—one of first impression—seeking an injunction and damages on the ground that the operation of defendant's systems in receiving the signals of these stations and transmitting them to the homes of the systems' subscribers constituted infringement of plaintiff's copyrights. The principal issues thus presented were whether the operation of defendant's systems constituted a "performance . . . in public" of the copyrighted motion pictures within the meaning of sections 1(c) and 1(d) of the Copyright Act, and whether the operations of defendant's systems in aiding public reception of broadcasts licensed by the copyright owner were in any event protected from copyright-infringement liability by a license implied in law.

> "Pursuant to a pre-trial order, these issues were separated from unrelated issues,[4] and were tried on the assumptions that the plaintiff owned valid copyrights in the motion pictures and that defendant's CATV systems received and transmitted the signals of television stations which broadcast the motion pictures." (App. A, p. 3)

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[4] Reserved under the pre-trial order for subsequent trial were affirmative defenses relating to the particular facts of the case, including issues concerning the validity of plaintiff's asserted copyrights, the existence of a license implied in fact by reason of (among other things) plaintiff's course of conduct in dealing with the television stations, and the issue of estoppel, as well as copyright misuse and antitrust defenses and the question of damages.

It was further assumed that the telecasts with respect to which defendant was alleged to have infringed had been duly licensed and authorized by plaintiff through license contracts with the television stations. Plaintiff thus stipulated that the broadcasting stations were not guilty of infringement by reason of the telecasts in question, and plaintiff also stipulated that it did not contend that the members of the public who received and viewed the telecasts through subscribing to defendant's systems were guilty of copyright infringement. (JA 27-28, 809, 817).

To much of the American public, television merely requires the purchase of a television receiving set. However, the process of television broadcasting and reception requires that there be a receiving antenna and a connection from the antenna to the terminals of the set. Every television set must have a receiving antenna and connection in order to function. The built-in antenna in the television set may be sufficient for reception of nearby stations. In other instances or in less advantageous locations, so-called rabbit-ear antennas will be necessary to get adequate reception. Where the stations are at greater distances, or the receiving location is disadvantageously situated under a hill or other blocking terrain or a building, it may be necessary (and it is common) to place the antenna on a pole or mast on the rooftop or otherwise, and a longer wire or cable connecting the antenna to the set, sometimes along with an amplifier, thereby becomes necessary.

The individual member of the public can improve the quality of his television reception by installing a larger antenna or by placing it at a higher and more advantageous location, the basic limiting factor being

only the amount of money he wishes to spend on his antenna installation and the quality of reception he will accept as adequate for this expenditure. More elaborate antenna installations and cooperative systems are common in suburbs and rural areas. Master antennas for a single building or group of buildings are common in metropolitan areas. The CATV system performs the same function as the homeowner's antenna and the connecting line to his set, the difference being that a master antenna and connecting line are made available by an entrepreneur to the set owner for a fee.

The court of appeals stated (App. A, pp. 4-5):

> The hilly terrain in and around Clarksburg and Fairmont makes reception by normal rooftop antennas of television programs broadcast by the Pittsburgh, Steubenville, and Wheeling stations difficult or impossible . . . .[5] Both the Clarksburg and the Fairmont CATV systems receive broadcast television signals by means of tall antennas on hilltops some two and a half and one and a half miles respectively from the city centers, and transmit them through coaxial cables strung along utility poles and smaller 'house drop' cables to television sets on subscribers' premises. The television signals of each station carried by a system are received by a separate antenna specifically designed and oriented to receive them.[6] The signals

[5] Fairmont is about 67 miles from Pittsburgh, 52 miles from Wheeling, and 65 miles from Steubenville; Clarksburg is about 82 miles from Pittsburgh, 57 miles from Wheeling, and 74 miles from Steubenville. JA 32 (district court opinion), 228-229.

[6] These antennas were of a common variety available in a radio store and widely used by the public. JA 208-209, 524-525, 880-881 (testimony of both parties' experts). All the reception of the signals by defendant's systems was "off-the-air"; that is, no microwave retransmission was involved.

of all the stations carried by the system are then transmitted together over its cables, without any editing or selection of programs, and the system has no way of knowing which program, if any, a subscriber has turned on. Both CATV systems carried three stations from their inception in 1952 to 1958, and five thereafter. Although there are local television broadcasting stations in Clarksburg and Weston, West Virginia, the CATV offerings attracted substantial numbers of subscribers to both systems.[7] At the end of 1963, the Clarksburg system had 9,571 subscribers and the Fairmont system 6,047. The number of subscribers of each system in 1960 was over half the number of occupied housing units counted by the United States Census of Housing in the area they served.

"Defendant, like its predecessors, is a private corporation operating the CATV systems for profit under municipal franchises. Each subscriber pays an initial charge, which is reduced if his premises are already connected to the CATV system, and fixed monthly charges.[8] Additional charges are made for connecting additional sets. Different charges, sometimes individually negotiated, have at times been established for hotels, motels, and other nonresidential subscribers. Both

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[7] Within the period covered by this action, the two "local" stations were carried by defendant's CATV systems. WBOY, located in Clarksburg, was carried by the Clarksburg system beginning in 1962, and WJPB, located in Weston (about 15 miles from Clarksburg), was carried by both systems from March, 1964. JA 39 (district court opinion), 207.

[8] The contract between defendant and its subscribers related to television "signals". It obliged defendant "to extend its Community Antenna System'. . . to make available television signals to the Subscriber at the following premises . . . ." Exs. 47, 51 and Q 2, JE 168, JE 176, JE 417. The charges under the contract were unrelated to programs viewed by the subscriber or to the subscriber's use of his television set.

the Clarksburg and the Fairmont systems have advertised the variety of stations and programming they made available, at times in connection with particular programs. Both systems conducted mail ballots among their subscribers to determine which stations they preferred to receive."

The court of appeals went on to give the following summary of the technology of television broadcasting and of the operation of defendant's systems (App. A, pp. 5-7):

". . . Television broadcasting equipment first translates the sight and sound of the program being broadcast into two voltages, the video signal, which measures the intensity of light at each spot on a photosensitive screen inside the camera as it is scanned by an electron beam, and the audio signal which measures the intensity of sound. These two changing voltages are then encoded in a radio frequency carrier wave for broadcasting; the video signal is used to modify, or modulate, the amplitude, or maximum strength, of the carrier wave, and the audio signal is used to modulate the frequency of the carrier wave. The modulated carrier wave is then broadcast by an antenna as electromagnetic radiation. When this radiation strikes a home television antenna, it induces a voltage between the antenna terminals which reproduces the modulated carrier waves. The reproduced carrier wave is then conducted into the television set, and there demodulated to yield reproductions of the video and audio signals. The video signal controls the intensity of a scanning electron beam, which reproduces on the electroluminescent interior of the television tube the image seen by the camera, and the audio signal controls the speaker of the set. Since the broadcast radiation propagates at the speed of light, the whole process of television broadcasting and reception consumes a fraction of a second.

"The radiation broadcast by a television broadcasting station, when it strikes the corresponding antenna of one of defendant's CATV systems, induces in it a reproduction of the station's modulated radio frequency carrier wave just as it does in a home antenna. The CATV system's 'head-end equipment', housed in a small building near the antennas, then amplifies the carrier wave, converts it if it is a high-frequency, or high-band, VHF wave (channels 7 to 13) to one of the low-band VHF channels (2 to 6) in order to reduce losses in transmission through the system's coaxial cables, narrows its frequency range, and then propagates it as electromagnetic radiation through the system's cables. The radiation, amplified by numerous trunkline and distribution amplifiers along the cables, is transmitted at nearly the speed of light to the terminals of subscribers' television sets, in most cases through matching transformers.

". . . Thus broadcast television programs have never been made visible or audible within defendant's CATV systems. Nor have the systems originated television programs. . . ."[9]

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[9] As the statement of the court of appeals makes clear, defendant's systems deal only with electromagnetic energy, and at no point with the sights or sounds of television programs. They do not change the sights and sounds of programs into electromagnetic energy, as the broadcasting station does, nor do they change electromagnetic energy into the sights and sounds of programs, as the television set does. Their equipment receives the broadcast carrier wave in the form of electromagnetic energy—which induces in the CATV antenna a "reproduction" of the carrier wave "just as it does in a home antenna"—(App. A, p. 6) and the equipment "then propagates it as electromagnetic radiation through the system's cables". *Ibid.* This reception and transmission of electromagnetic energy—a process likewise performed by a rooftop antenna, a "master antenna" of the kind commonly used on apartment buildings, or a "rabbit ears" antenna attached to the television set itself—is the sole activity by which defendant's systems are alleged to have "performed" the copyrighted motion pictures.

The predicted service area of a television broadcasting station is calculated, pursuant to regulations of the Federal Communications Commission, in terms of the station's "Grade A" and "Grade B" "service contours". The Grade B contour delimits that area at whose outer limits television reception of "a quality acceptable to the median observer" is expected to be available at least 90 per cent of the time at the best 50 per cent of the receiver locations.[10] That the B contour represents a useful and legal measure of a station's service area has been recognized by the F.C.C. in numerous ways.[11] Of course, acceptable reception does not end at the B contour; as one moves further out, it gradually diminishes. Indeed the Commission sought in establishing the television assignment table to afford "each station the widest coverage possible consistent with an efficient utilization of the spectrum and the satisfaction of the needs of the various cities and communities in the United States."[12]

In the present case, the relationship between defendant's CATV systems and the B contours of the five

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[10] "Grade A service is so specified that a quality acceptable to the median observer is expected to be available for at least 90 per cent of the time at the best 70 per cent of receiver locations at the outer limits of this service. In the case of Grade B service the figures are 90 per cent of the time and 50 per cent of the locations." F.C.C. *Sixth Report and Order on Television Allocations*, 1 (part 3) Pike & Fischer R.R. 91:601, ¶ 97 (1952); see 47 C.F.R. § 73.684.

[11] One of the most recent and pertinent is the requirement of the F.C.C.'s comprehensive regulatory scheme for CATV that a CATV system carry upon request the signal of any station "within whose Grade B contour the system is located". *Second Report and Order*, §§ 66-67. See discussion *infra*, pp. 53-55.

[12] *Sixth Report and Order, supra* at n. 10, ¶ 138.

television stations was correctly stated by the court of appeals as follows: "Fairmont is within or on the B contour of four of the stations in suit, and Clarksburg is within the B contour of one." (App. A, p. 21) Thus, in one-half of the ten situations presented, defendant's subscribers (and its systems) are within or on the B contour of the station broadcasting the motion pictures.

Defendant at the trial offered to prove that plaintiff, through the license fees it received from the broadcasting stations, had in fact already been compensated, not merely for the reception of the licensed broadcasts by the public as a whole, but for their reception by the specific members of the public who subscribe to defendant's CATV systems. The offer of proof included such basic economic facts of the television industry as the fact that a station's advertising rates are based on the size of its audience, and the fact that the royalties paid by the station to copyright owners such as plaintiff are likewise based on the size of the station's audience. Defendant further would have proved the inclusion of defendant's CATV subscribers in the contemplated audiences of the licensed stations, and that the royalties exacted by plaintiff from the stations hence took into account — or must be considered to have taken into account — the anticipated reception of the broadcasts by those viewers.[18]

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[18] Defendant's offer of proof was rejected by the district court (A 1321-1327), and defendant challenged the rejection on appeal. Defendant's Brief in the court of appeals, p. 101 n. 115. The court of appeals properly recognized that, since the proof had been rejected, it was necessary for purposes of the appeal to assume the accuracy of the facts asserted by defendant. (App. A, p. 17)

B. The Decisions Below

The district court, in finding the operations of defendant's CATV systems to constitute an infringing "performance" of plaintiff's motion pictures, relied principally on what it deemed to be the electronic and technological functions of defendant's equipment.[14] The court recognized that the statutory words "to perform", in their commonly understood meaning, might well fail to encompass the acts done by defendant's systems: "On the premise that words are only the means of communicating thoughts or ideas, it may be contended, with a degree of validity, that the words 'to perform', as commonly used in everyday speech by the average layman, are not intended to encompass the aggregate or composite of the acts of [defendant's systems] . . .". JA 67; 255 F. Supp. at 201. The court rejected the common meaning of the statutory language, however, in favor of a process of statutory interpretation which it described as "a judicial application of the principle of semantic extension". JA 105; 255 F. Supp. at 213, n.20.

On the question whether public reception of broadcasts licensed by the copyright owner is protected by a

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[14] "The finding that defendant's activity constituted a performance was based on an analysis of the electronic process employed in the defendant's operation. The court found the 'essential feature' of CATV's operation to be that when it received the signals from the TV station and fed them into the amplifying equipment which formed a part of its transmission system, it 'created output signals which are replicas in electronic terms of the input signals' and which 'duplicate and reproduce . . . the patterns . . . that originated from the broadcast antenna. . . .' The Court found that this process of duplication constituted an infringing performance." Note, *CATV and Copyright Liability*, 80 Harv. L. Rev. 1514, 1517 (1967).

license implied in law under the Copyright Act and/or the Federal Communications Act, the district court stated simply: "The question being not whether there *is* an implied in law license to perform publicly for profit but whether there *should* be, this court holds that there should not." JA 88; 255 F. Supp. at 211. (Emphasis in original)

Having decided the issue of copyright infringement in favor of plaintiff, the district court certified that in its opinion the decision involved a controlling question of law as to which there was substantial ground for difference of opinion, and that an immediate appeal as authorized by 28 U.S.C. § 1292(b) might materially advance the ultimate termination of the litigation. JA 123. Based on that determination, the Court of Appeals for the Second Circuit granted petitioner's application for leave to appeal under 28 U.S.C. § 1292(b). JA 18.

The court of appeals, in affirming the district court's judgment, brushed aside the technological grounds on which that court had relied, stating that "the result produced by defendant's systems constitutes a public performance, and . . . the technical means by which the result is produced are irrelevant to this issue." (App. A, pp. 14-15, n. 9) The "result" which the court of appeals found crucial, and which it held to be "fairly characterized as a public performance infringing the copyrights", was "the simultaneous viewing of plaintiff's copyrighted motion pictures on the television sets" of defendant's subscribers. (App. A, p. 7) The operations of defendant's systems were held to constitute a "performance" of the motion pictures, and hence to impose infringement liability on defendant, because of "the magnitude of [defendant's] contribu-

tion" to that "result" taking place in the homes of defendant's subscribers, despite the fact that the reception and viewing by the subscribers were conceded by plaintiff to be non-infringing. (App. A, pp. 7, 10, 12, 13)

The court of appeals did not discuss the meaning of the statutory term "perform", but stated that its conclusion was reached "in light of prior decisions and of the policies of the Copyright Act . . . ." (App. A, p. 7) So far as prior decisions were concerned, the court mainly relied on this Court's decision in *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931). So far as "the policies of the Copyright Act" were concerned, the only policy recognized by the court as relevant to the issue of "performance" was the Act's "fundamental purpose . . . to protect copyright proprietors against dilution of the market for their works" (App. A, p. 10)—a policy requiring, in the court's apparent view, exclusive consideration of the extent to which "a television broadcast of a copyrighted work harms the copyright holder . . . ." (App. A, p. 12)

On the issue of a license implied in law, the court of appeals recognized that "the question of an implied-in-law license to disseminate a radio or television broadcast is one of appellate first impression". The court proceeded to deny the existence of such a license on the ground that: "In an age of motion pictures and radio and television broadcasting, it would seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas and audiences . . . ." (App. A, p. 19) Thus, the copyright owner must be allowed, in the court's view, "the right to limit its

licenses to viewers who can receive the broadcasts through normal rooftop antennas". (App. A, p. 20) With respect to defendant's argument that in the absence of an implied license defendant's subscribers "will in effect pay twice for television programs, once by buying the products and services of the advertisers who support the original broadcast and once by paying for CATV services" (App. A, p. 20), the court responded that "Whatever force this 'double payment' contention may have, it must be made to Congress, inasmuch as it 'involves purely legislative considerations' " and does not involve any relevant policy of the Copyright Act. (App. A, p. 20)

The court of appeals went on, however, to place what might appear to be an important limitation on its holding denying the existence of a license implied in law. It sanctioned the copyright owner's right to collect a second royalty through a CATV system only where the CATV system's subscribers "could not receive the licensed broadcasters' signals satisfactorily" (App. A, p. 22) by "normal antennas" or "normal rooftop antennas". (App. A, pp. 20, 22) The court stated:

> "A different case might be presented, which we do not decide, if a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas, as it might then be contended that a copyright holder licensing a broadcast of a work over such a station must be held to have licensed their viewing of the work." (App. A, p. 23)[15]

[15] The court did not define a "normal antenna" or "normal rooftop antenna" nor otherwise elaborate on how its possible reservation should be applied in particular fact situations. See discussion *infra*, pp. 47-51.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW BY A NOVEL INTERPRETATION GREATLY ENLARGED THE COPYRIGHT MONOPOLY IN DISREGARD OF BOTH THE PRINCIPLES OF STATUTORY CONSTRUCTION ADOPTED BY THIS COURT AND THE PRIMARY PUBLIC POLICY OF THE COPYRIGHT ACT AND OF THE COMMUNICATIONS ACT.

This is a case of first impression on the applicability of the federal copyright laws to the service provided by a community antenna television system (commonly referred to as CATV). Plaintiff, the owner of copyrighted feature films and cartoons, licensed television stations to broadcast the films to the public. The court below ruled that defendant's two community antenna systems, by receiving the broadcast signals and making the signals available to subscribers, infringed plaintiff's exclusive right under sections 1(c) and (d) of the Act to perform the copyrighted motion pictures in public.

The decision below clearly involves an important question of federal law which has not been, but should be, settled by this Court. The decision extends federal copyright restrictions for the first time to the reception and viewing of publicly broadcast television programs by members of the American public in their own homes on their own television sets. If allowed to stand, the decision will increase the cost of television viewing for millions of Americans. It will also remold the structure of the television industry for years to come. It will place control over CATV—already an important part of the national communications system—in the private hands of the few companies that control the overwhelming bulk of television-program copyrights, and will substantially oust the control now being exercised in the public interest through regulation by the

F.C.C. Review of the decision by this Court is further in order because the interpretation of the Copyright Act by the court below is contrary to the statute's meaning and intent, conflicts with principles of construction adopted by this Court, is based on a serious misinterpretation of a decision of this Court, and—most important—contravenes important public policies embodied in the Copyright Act and the Federal Communications Act.

The nationwide importance of this case is underlined by affidavits filed on behalf of plaintiff in the trial court by two of the networks and several major motion picture companies. (R 3909-3923). Illustrative of the statements made was that of American Broadcasting—Paramount Theatres, Inc., which stated that "the instant case is of decisive importance to the television industry as a whole." (R 3909). Plaintiff has also submitted a brief (R 5268 *et seq.*) in connection with franchise proceedings in many cities throughout the country referring to this lawsuit and arguing that the cities would be jointly liable with the CATV systems for copyright infringement. In testifying as to the application of copyright to CATV systems, the Register of Copyrights stated that this issue "is inextricably bound up with policy questions in the communications field; these are questions of national importance that can affect the course of radio and television communications for years to come." [16]

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[16] Statement of Abraham L. Kaminstein, Register of Copyrights, in Hearings pursuant to S. Res. 201 on S. 1006 before the Subcommittee on Patents, Trademarks and Copyrights of the Senate Judiciary Committee, 89th Cong., 2d Sess. (Aug. 2, 1966).

1. The Decision Below Adversely Affects Millions of Television Viewers and Affects the Future of the Television Industry

Community antennas began in 1949, virtually at the beginning of commercial television, a reflection of the fact that homeowners must provide or secure a suitable reception antenna. A broadcaster is given a license to use a public airway for "broadcasting". "Broadcasting" is defined in the Federal Communications Act as "the dissemination of radio communications intended to be received by the public . . ." 47 U.S.C. § 153(o). While the broadcaster gets what amounts to a monopoly to use a particular airway, he has no obligation to see to it that persons within range of the station are able to receive the broadcasts. It is up to each member of the public to decide what set he wishes to buy, and what antenna he will install to overcome natural obstacles which may hamper reception. Community antennas came into existence because of public demand for someone to provide an antenna service which improves reception in areas where terrain or distance make reception costly or difficult.

Recently published figures indicate that as of January 1, 1967, there are approximately 1,770 CATV systems in the United States serving approximately 6,000,000 persons in about 2,100,000 television homes.[17] The power granted to copyright owners under the decision threatens the viewing of millions of persons who presently get their television through reception on CATV systems, particularly in communities isolated

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[17] *Television Factbook*, No. 37 (1967) Services Volume, p. 54a. See *Second Report and Order*, ¶ 31. The National Community Television Association has reported that there are approximately 3,000,000 homes served by CATV.

by distance or terrain from metropolitan areas. It also is an immediate threat to the many private businessmen operating CATV systems, apartment houses with master antennas, and the many cooperative antenna systems.

The measure of the threat to the CATV industry is shown by the fact that in a single week a five-channel CATV such as petitioner's would receive well over 1,500 telecasts.[18] Conservatively, 1,000 of these telecasts will involve a copyrighted program. If the statutory minimum of $250 per infringement, claimed by respondent, is levied for each program, the statutory minimum damages would be $250,000 per week or $1,000,000 per month.[19] But this is not all. Within these copyrighted programs, copyrighted music is also broadcast. The claim for infringement of the music copyrights by such organizations as ASCAP—which filed an amicus brief supporting plaintiff in the court below—would substantially increase the potential liability. This potential liability for a single month exceeds what was paid for these systems (JA 204-205). Nationwide the past liabilty of CATV systems for the three-year statutory period threatens a take-over of CATV by copyright owners as the only means of discharging the liability. The staggering amount of this past liability makes it clear that any suggestion that

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[18] The complaint in this case alleges multiple infringements of the over 1,300 movies and cartoons involved. (R. 3342 *et seq.*; R. 3423 *et seq.*)

[19] 17 U.S.C. § 101(b) provides for recovery of damages and profits, and in the absence of proof of damages and profits, a minimum of $250 and a maximum of $5,000 for each infringement.

CATV can "absorb" these copyright charges is ludicrous.

Moreover, no organization of copyright owners exists or could be created with whom CATV operators could negotiate for licenses for the future. The CATV owner does not control or know what is to be broadcast. Published programs of television stations are frequently modified by the station before broadcast and the CATV operators could never be sure what programs would be telecast. Even if this program identification problem could be overcome, the CATV operator would have no way to identify the owner of the copyright of the program. Assuming that the owner could be identified and located, the CATV operator would be at his mercy in any negotiations since the CATV has no bargaining position. The average CATV system is not large, having approximately 1200 subscribers.[20] The only recourse a CATV operator would have in most situations in response to an exorbitant demand of a copyright owner would be to cease reception of the broadcast. If the CATV is forced to cease reception because of the excessive demands of a particular copyright owner or owners, the interruptions to the antenna service would be such that the business would soon be destroyed.

Even if one were to disregard the devastating effect of past liability, the decision below merits review by this Court because it will give the copyright owner the means of controlling reception of broadcasts for his own purposes. As Columbia Broadcasting System an-

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[20] See figures and source cited *supra*, p. 23.

nounced in its Press Release when it filed its suit,[21] it will use copyright as a means of preserving "the present system of nationwide program distribution by television networks through their affiliated stations".

The Department of Justice has pointed out that blanket extension of copyright liability to CATV systems "raises possibilities of harmful competitive consequences. . . ."[22] In the Department's view, competition would be harmed in at least three significant respects:

> ". . . First, the nature and composition of the CATV industry may be transformed should the provision be enacted. Ownership and control of copyrights is highly concentrated in the networks, movie studios and other television producers. . . ."
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> ". . . Given the power to subject CATV systems to copyright liability, the networks or the other

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[21] CBS has brought a suit against a corporation owning CATV systems charging copyright infringement in the United States District Court for the Southern District of New York, which suit is presently pending. See *Columbia Broadcasting System, Inc.* v. *TelePrompTer Corp.*, 251 F. Supp. 302 (S.D.N.Y. 1965) (CBS motion for summary judgment denied). At the time the suit was filed, the Press Release was issued (December 11, 1964).

[22] Statement of Acting Assistant Attorney General Edwin M. Zimmerman in Hearings pursuant to S. Res. 201 on S. 1006 before the Subcommittee on Patents, Trademarks, and Copyrights of the Senate Committee on the Judiciary, 89th Cong., 2d Sess., (August 25, 1966) This statement on behalf of the Justice Department was delivered in opposition to a proposal in a copyright-revision bill before the Subcommittee which would have brought about an "explicit and blanket extension of copyright liability to CATV systems" (*id.*), thereby achieving the same result as the decision below in this case.

large copyright holders might withhold permission to rebroadcast their programs and thereby seek to reserve the CATV market for themselves. . . ."

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". . . Moreover, were the copyright owners to achieve control of a substantial portion of the CATV business, they could impede entry of other independent operators into the field by refusing to allow such poteptial competitors to carry their programs. . . ."

* * * *

". . . A second possible anticompetitive development could arise if Congress or the Federal Communications Commission should decide to allow CATV systems to originate their own programs. CATV then could compete with existing networks, providing an additional market for program producers and an important channel for reaching the viewing public apart from the existing major networks. Assuming the potential development of such competition, it would be clearly undesirable to allow networks to use their ownership or control of program copyrights to extend their power into ownership of CATV facilities, or to limit the independence of CATV operators. . . ."

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". . . Finally, CATV systems run a second communications cable into each house that they serve. This cable may in the future also provide access to many new electronic services industries. If . . . a few large copyright holders directly or indirectly [to] control this second wire, it may discourage the development of competition in these prospective industries."

What is at stake here is not merely the conflicting private interests of two groups of businessmen. The

decision below, if allowed to stand, will affect the public interest not only by increasing the cost of television viewing for millions of Americans but by controlling the structure of the television industry for the indefinite future.

2. The Decision Extends the Performance Monopoly in a Novel Manner

The court below ruled that defendant's CATV systems were infringing the performance monopoly because the "result brought about by" their activities could be "fairly characterized" as a public performance within the monopoly (App. A, p. 7). The "result" was "the simultaneous viewing" of plaintiff's motion pictures on the subscribers' own home television sets (admittedly not an infringement).

The court below made it perfectly plain that "the technical means by which the result is produced are irrelevant" to it ruling (App. A, p. 15, n.9), and that, in its view, CATV systems "perform" copyrighted works no matter what equipment is used.

Copyright is a "wholly statutory"[23] limited monopoly based on two policies. The primary policy of the limited monopoly granted by Congress is "to induce release to the public of the products of . . . [the author's] creative genius".[24] The court below did not even mention this primary policy but instead focused on reward to the copyright owner although this Court's

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[23] *White-Smith Music Publishing Co.* v. *Apollo Co.*, 209 U.S. 1, 15 (1908).

[24] *U.S.* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 158 (1948).

decisions make it plain that "reward to the owner [is] a secondary consideration" under the Copyright Act. *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954). Moreover, the words of the Act, this Court has decided (in construing the term "copy" in the Act), should be construed in the light of their "ordinary signification" and "ordinary sense".[25] The court below, however, turned away from both these policy considerations and the principles governing interpretation of the language of the Act as announced by this Court.

Conceding that "no legislative history indicates whether Congress expressly intended the exclusive right to perform in public to embrace the operation of systems like defendant's" (App. A, p. 7), the court of appeals found one case on which it thought it could base its ruling, *Buck* v. *Jewell-LaSalle Realty Co.,* 283 U.S. 191 (1931).

We submit that the court misread the *Jewell-LaSalle* case. There the issue arose from

> "the acts of a hotel proprietor, in making available to his guests, through the instrumentality of radio receiving sets and loudspeakers installed in his hotel and under his control and for the entertainment of his guests, the hearing of a copyrighted musical composition which has been broadcast from a radio transmitting station" (*id.* at 195-196).

This Court held that the hotel's providing an audible rendition for its guests on equipment provided by the hotel constituted a performance within the meaning of

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[25] *White-Smith Music Publishing Co.* v. *Apollo Co., supra,* n.23, at pp. 12, 16.

section 1(e) of the Act.[26] The opinion emphasized that the hotel had produced the music "by instrumentalities under its control" and pointed out that the rendition on the *hotel's* equipment was a substitute for the hotel's engaging an orchestra (*id.* at p. 201). The opinion concludes that "the reception of a radio broadcast and *its translation into audible sound*" constituted "essentially a reproduction" (*id.* at 199-200), which "amounts to a performance" (*id.* at 201).[27] (emphasis supplied)

The *Jewell-LaSalle* interpretation of "performance" is consistent with the "ordinary sense" rule of construction adopted by this Court in the *White-Smith* decision; the hotel's activities were within the common meaning of a "performance"—an audible rendition of the work was provided to the public in the hotel. Here, in contrast, it is conceded that the programs never became audible or visible on defendant's systems; they

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[26] It should be noted that the broadcast of the musical composition by the radio station had not there been authorized by the copyright proprietor. *Jewell-LaSalle* specifically reserves the issue whether a license might have been implied as a matter of law if the broadcast had been authorized (*id.* at n. 5). The court below recognized that the issue as to an implied-in-law license to receive was "one of appellate first impression" (App. A, p. 17). *Cf. Society of European Stage Authors & Composers, Inc.* v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S.D.N.Y. 1937). See discussion *infra*.

[27] The question certified to this Court specified the fact that the hotel proprietor had made available "the hearing" of the song (*id.* at 196). In *Society of European Stage Authors & Composers, Inc.* v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S.D.N.Y. 1937), the hotel had installed a master receiving set as in *Jewell-LaSalle* which was connected to loudspeakers in each room. It was stipulated that a witness had checked into the hotel and listened to the broadcast song, 19 F. Supp. at 3-4.

are audible or visible only in the homes of subscribers when the subscribers chose to turn their own sets on.[28]

As a limited monopoly granted by Congress in derogation of the general policies against monopolies, the copyright statute "ought to be reasonably construed with a view to effecting the purposes intended by Congress" and "ought not to be unduly extended by judicial construction to include privileges not intended to be conferred . . . ." *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, 346 (1908). There is nothing to indicate that Congress intended the statutory word "perform" to have other than its "ordinary signification", a rendition of the work that was audible and visible to observers.

The court below concluded that the "nub" of the *Jewell-LaSalle* decision was—"how much did the defendant do to bring about the viewing and hearing of a copyrighted work" (App. A, p. 10). Nothing in the *Jewell-LaSalle* case or any other decision of this Court supports the creation of this contributive concept of "performance", particularly where it is created to achieve a sweeping enlargement of the "performance" monopoly granted by Congress. In *Jewell-LaSalle* the hotel produced the audible music on its own instrumentalities; there was no standard of "contributing"

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[28] Compare *Canadian Admiral Corp.* v. *Rediffusion, Inc.,* [1954] Can. Exch. 382. The district court erroneously relied on this case as establishing performance by CATV reception (R. 92a). In fact, the Canadian case involves a "rediffusion system", not a CATV system; the Canadian systems, as the Canadian Court emphasized, owned and furnished the sets ("complete terminal units") to the subscribers. The Court ruled that the service provided by the rediffusion system to home television viewers was not an infringement, and that the image in the homes on these terminal units was a private, not a public, performance. *Id.*, pp. 401, 402.

relevant to the performance by the hotel. Nor can the decision below find any support in the doctrine of contributory infringement. In the present case, in contrast to *Jewell-LaSalle,* both the broadcasting and the viewing are conceded not to be infringing. Under the decision below, defendant's reception of the authorized telecast and transmission of the signals resulted in "bringing about" viewing by subscribers, which was conceded to be non-infringing. Thus, what the court held to be "fairly characterized as a public performance" was not the acts done by defendant's systems, but rather the acts done by defendant's subscribers: their "simultaneous viewing" of the motion pictures in their own homes on their own television sets. If "the result brought about by one of defendant's CATV systems" is concededly a noninfringing one, it is impossible to understand how defendant's systems can be held liable for infringment on the ground that they bring about that result.

The *Jewell-LaSalle* case, decided 37 years ago, dealt with a special situation not present in this case: an unauthorized broadcast was used by the hotel on its loudspeaker equipment in lieu of hiring an orchestra. (283 U.S. at 201) The decisions below erroneously attempt to distill from this opinion a principle dealing with facts not involved in the *Jewell-LaSalle* opinion. It is appropriate for this Court, therefore, to review the decisions below and to reconsider the distorted meaning which those decisions have given to the opinion in *Jewell-LaSalle.*[29]

[29] If we are wrong and *Jewell-LaSalle* does compel the result and the doctrine of "performance" announced by the court below, then we would respectfully suggest that this Court may deem it appropriate at this time to reconsider *Jewell-LaSalle.*

3. Mere Transmission of Electromagnetic Energy by a CATV Which "Contributed" To Viewing on Subscribers' Own Sets Produced Non-Infringing Private Performances in the Homes, Not a Public Performance by the CATV

The district court pointed out that "performance" has "in common parlance" three elements: an actor, a work to be performed, and an audience to see and hear (JA 70, 71). The court acknowledged that "the words 'to perform' as commonly used in every day speech by the average layman" do not encompass the operation of a CATV—the reception of broadcast signals and the transmission of those signals without converting them into sight or sound (JA 67). However, by a process of interpretation, which it called "a judicial application of the principle of semantic extension" (JA 105, n. 21), the court adopted an "expanded scope of the concept 'to perform' " to cover mere transmission of electromagnetic energy (JA 93).

The court of appeals rejected the technological analysis on which the district court based its opinion. It did not examine the meaning of the word "perform", although the court's reasoning is based on the premise that sight and sound are an essential ingredient of performance. The court found the sight and sound in the "viewing" by the subscribers. Defendant's "performance" was its contribution to the viewing. But it is clear that the viewing by subscribers in their homes is a private performance and is conceded to be non-infringing. Viewing by homeowners on their own sets may be multiple private performances but no case has suggested that these non-infringing private perform-

ances are public performances.[30] To reach the conclusion that defendant's contribution to that viewing constituted a "public performance", the court turned to an analogy of CATV and a broadcaster, an analogy unsound in fact and invalid in law.

While the court below rested its decision of the "performance" issue indispensably on *Jewell-LaSalle,* it also made an argument to the effect that defendant's CATV systems must have "performed" the motion pictures because broadcasting stations are held to perform copyrighted material embodied in the programs they broadcast, citing *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), *cert. denied,* 269 U.S. 556 (1925). The court then argued that the "performance" by the broadcaster cannot take place in the broadcasting studio—as the cases in fact held [31]—because the visible or audible rendition of the copyrighted work that typically takes place in the studio may be dispensed with in the case of "the broadcast of taped and relayed programs or, usually, of motion pictures." (App. A, p. 12) Finally, the court was faced with the ultimate facts that broadcasting has a unique status under the Copyright Act and the Federal Communications Act—for example, the broadcaster has a duty under the Communications Act to select and originate programs, and

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[30] The *Canadian Admiral* case, *supra,* n.28, held that the private performances in the home did not "solely because of their numbers . . . become public performances". [1954] Can. Exch. at 408. See also *Nimmer on Copyright* § 107.42 at 412 (1967).

[31] See pp. 35-36 and n.32, *infra.*

public performance "by broadcast" is expressly recognized by the Copyright Act—and that a CATV system is in no respect a broadcaster. The court's response at this point was to drop the broadcaster analogy and switch back to its basic reliance on *Jewell-LaSalle*:

> "But the Supreme Court held in *Jewell-LaSalle* that the hotel performed the broadcast musical compositions although it did not select them. . . ." (App. A, p. 12)

The theory that CATV systems "perform" because broadcasting stations do is no more tenable than the reliance on the hotel in *Jewell-LaSalle*. The answer to the broadcasting theory begins with the original and archetypal broadcast, which involves a "live" rendition of the work arranged by the broadcaster in his studio. In such a case what takes place in the studio is audible and visible and clearly a "performance" within the meaning of the Act. This was the situation in the leading *Remick* case, *supra*, p. 34, cited by the court below. The copyrighted music there had been played "live" in the broadcaster's studio, and the question considered and decided in the affirmative was not whether the broadcaster had performed the music—he obviously had—but whether the broadcast had made the performance "public". Other cases dealing with the "public performance" liability of broadcasters consistently confirm this interpretation that the work is "performed" in the studio and that the broadcast—the broadcaster's dissemination into the air for reception by the public of the broadcast waves into which he has converted the sights and sounds of the work—con-

stitutes the means by which that performance is made public.[32]

The imposition of "public performance" liability on the broadcaster was supported, of course, by the consideration that the radio or television broadcast served as a substitute for a "live" performance of the work in a concert hall or theater which the members of the public receiving the broadcast might otherwise have attended, and for which the copyright owner would have received a "performance" royalty as intended by Congress. If the copyright owner could not collect a royalty from the broadcaster, he would have received no payment at all for the public's reception and enjoyment of the broadcast work.

Once the broadcaster's liability for a "public performance" was recognized in the case of "live" broadcasts, it followed naturally that the same result should be reached in cases where the broadcaster dispenses with the live performance in his studio and substitutes the playing of a record, tape, or motion-picture film, or a program supplied to him (usually through telephone lines or microwave transmission) by a "network." Although the technical methods employed have changed, all relevant considerations support the same

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[32] The interpretation is clearly stated by several British Commonwealth cases which cite and rely on the *Remick* v. *American Automobile Accessories* decision. *Messager* v. *British Broadcasting Co.*, 2 K.B. [1927] 543, 548, *rev'd on other grounds*, 1 K.B. [1928] 660, *aff'd*, [1929] A.C. 151; *Chappell & Co., Ltd.* v. *Associated Radio Co. of Australia, Ltd.*, [1925] Vict. L.R. 350, 351-52, 358, 362. See also *Mellor* v. *Australian Broadcasting Commission*, [1941] A.C. 491, 500. See also *Jerome H. Remick & Co.* v. *General Electric Co.*, 16 F. 2d 829 (S.D.N.Y. 1926), cited by the court below. App. A, p. 11, n.6.

result.[33] The Act expressly recognizes that the playing of a record, film, or tape on which the copyrighted work is recorded constitutes a "performance" of the work.

The essential fact remains that whether the broadcast is "live" or from tape, or film, or a program supplied by a network, the broadcaster is still selecting, originating, and procuring the programs that he broadcasts to the public—functions for which he is legally responsible, and which he cannot delegate, under the Federal Communications Act.[34] So far as the broadcaster is concerned, when he decides to obtain his program material from tape or film, or a network, he is substituting this method of program origination for the live performance that he would otherwise have staged in his studio.

The rule that a "broadcast" constitutes a "public performance" is expressly confirmed by the language of section 1(c) of the Copyright Act, as amended by Congress in 1952 (66 Stat. 752).

Of the various characteristics peculiar and essential to the broadcast function that produce the broadcaster's "public performance" liability, not one is applicable to defendant's CATV systems. They are in no respect engaged in "broadcasting."[35] They do not select, originate, or procure programs. They do not convert

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[33] In fact there is an audible and visible rendition of the program in the broadcasting studio—at least on the "monitors" that are employed as a necessary part of the station's equipment. See JA 824-826.

[34] 47 C.F.R. § 73.658(e).

[35] It is settled that a CATV system is not a broadcaster. *In the Matter of Inquiry Into the Impact of Community Antenna Television Systems, etc.*, F.C.C. Docket No. 12,443, 18 Pike & Fischer R.R. 1573, ¶¶ 65-67 (1959).

the sights and sounds of programs—whether in the form of a live performance or of information stored on records, tape, or film—into electromagnetic waves for transmission through the air to the public.

By disregarding the fundamental differences between CATV and broadcasting, the court below disregarded the teaching of *White-Smith* against the extension of the scope of the monopoly by judicial construction to new areas or businesses not existing at the time of the statutory enactment and not clearly within the Congressional intent. The "anticompetitive consequences" of that extension, a matter surely relevant to a consideration whether a limited monopoly should be enlarged to give control of a new business to the copyright owner, was pointed out by the Department of Justice (*supra*, pp. 26-27).

4. The Decision Below Disregards the Primary Policy of the Copyright Act and of the Communications Act

The court below justified its interpretation because of the "harm" to the copyright owner from the viewing by the subscribers since this viewing is a "dilution of the market" and would disrupt the owner's exploitation of the territorial areas of permissible public reception which he establishes (App. A, pp. 19-20).[36] But this is to make the meaning of the statutory word turn on supposed harm or benefit to the copyright owner in his method of exploitation rather than on the "ordinary" and "normal" meaning of the words of the law. Moreover, it overlooks the fact that the copy-

[36] This Court rejected the argument that what "harms the copyright holder" is the test of infringement under the Copyright Act. *White-Smith Music Publishing Co.* v. *Apollo Co.*, *supra* n.23, at p. 18.

right owner has received his award from the broadcaster.

The copyright owner has received his payment—his reward—for licensing the release of the broadcast which as a matter of law must be "intended to be received by the public". (47 U.S.C. § 153(o)) It is settled that CATV is not a broadcaster;[37] indeed, its operations differ fundamentally from a broadcast station. A broadcaster's function is to originate programs, and he pays the copyright owner for the right to telecast the program he selects so that he can sell commercials in connection with the telecast program. The copyright owner has received his reward for the release to the public which the station as a matter of law intends to serve when it makes its broadcast.

The court below focused on protecting the copyright owner without regard to the fact that it was unnecessary to construe the "performance" right in such an expansive manner in order to provide a "reward to the owner" of the copyright,[38] and indeed that its construction gave him a double reward for the same performance. Because of the economic structure of the television industry, the royalty which plaintiff extracted from the television station for the broadcast of his copyrighted works took into account or could have taken into account the presence of defendant's CATV subscribers within the public which makes up the station's audience. This payment to the copyright owner,

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[37] *In the Matter of Inquiry, etc.*, F.C.C. Docket No. 12,443, *supra* at n.35.

[38] The district court likewise relied exclusively on the policy of "protecting the copyright proprietor's performance monopoly" (JA 72) without regard to any other policy of the Copyright Act.

under our system of television, is borne by the public who patronize the advertiser.

As defendant offered to prove (JA 1319-24), the economics of television stations are related to coverage, *i.e.*, evidence of reception. The amounts which stations pay for programs to telecast and the rates which advertisers are charged for advertising over the station are both related to the size of the audience, the coverage of the station. The standard measure of television coverage are reports by rating services such as Neilsen and American Research Bureau (ARB).[39] Defendant's subscribers were included by the rating services within the coverage of the stations here involved, and that coverage was advertised by the television stations involved. Indeed, plaintiff used the rating-service coverage of certain of these films and of these stations, including Clarksburg and Fairmont, in its own advertising.[40] Thus the audience for the broadcast which plaintiff licensed included defendant's subscribers.

The decision below authorizes the extraction of a second payment—a second royalty—for the same broadcast. Although the copyright owner had already been compensated by the broadcaster for the reception of the broadcast, he can now impose an additional charge on those in the station's service area who choose to subscribe to the reception service provided by a

[39] The F.C.C. in its *Second Report and Order* used the ARB rating service to determine the size and rank of television stations in its so-called top-100 market regulation. (¶ 141)

[40] The coverage of television stations as shown by the rating services is published in standard reference works such as *Television Factbook*, published by Television Digest. These sources demonstrate the inclusion of defendant's subscribers in the audience of the stations plaintiff licensed to telecast. See, *e.g.*, *Television Factbook* No. 35 (1965) pp. 548-b, 546-b, 707-b, 494-b, and 544-b.

CATV. Accordingly, the court's decision sanctions the result, in conflict with the principles of the Court's decision in *Aro Manufacturing Company* v. *Convertible Top Replacement Co.*, 377 U.S. 476 (1964), that the copyright owner can restrict and charge for the public's enjoyment of television broadcasts, even though it has extracted, through the broadcaster, a royalty attributable to that public's viewing of the telecast (App. A, pp. 20-21). The court below sought to avoid the *Aro* decision by asserting that the "double payment" was a legislative matter for the Congress, but *Aro* teaches that this consideration of double payment is not only relevant but perhaps determinative in the interpretation of the Copyright Act. This case squarely poses the question as to how many royalties the copyright owner may extract for the same broadcast to the same public.

The mechanism by which the court below permitted the collection of the second royalty is itself a significant expansion of the copyright monopoly. The court explicitly sanctions territorial zones by copyright licenses.[41] Although no case has previously gone this far, the court below would permit a copyright owner to use a copyright license to draw territorial lines around broadcasting stations whenever and wherever in his judgment this would increase his reward, or enable him to achieve other business objectives.[42] The

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[41] Apparently the copyright proprietor's zones will supplant the regulatory authority of the F.C.C. under 47 U.S.C. § 303(h).

[42] The court below characterized the issue as "divisibility of the copyright owner's exclusive right to perform" and stated that "it would seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences * * *". (App. A, p. 19)

possibility of such territorial divisions is not speculative. The plaintiff has attempted to draw such lines in its licenses which purport to limit the station's license to telecasting within the Grade A coverage contour of the station. (Ex. O, clause Twenty-Fifth, JE 343) Moreover, it has asserted in its form contract the right to prevent the public from utilizing the service of a community antenna. (*Id.*, clause First and Twenty-Fourth JE 340, 343)

The "anticompetitive consequences" are a relevant consideration in determining whether an expansive interpretation is to be given to the statutory copyright monopoly. Ownership of copyrights in television is highly concentrated.[43] The economic power to control television through control over programs through copyrights, pointed to by the Department of Justice (quoted *supra*, p. 26) would be greatly enhanced by the extension of the copyright monopoly to permit territorial lines of permissible public reception to be drawn by use of the copyright monopoly.[44]

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[43] See testimony of respondent's President that the 14 companies for whom he was speaking represented "in excess of 75 per cent of the copyright material which is going over the airwaves today". Hearings on H.R. 4347 before Subcommittee No. 3 of the House Judiciary Committee, 89th Cong., 1st Sess., p. 1332 (1965). See also Statement of Department of Justice quoted *supra* at p. 26.

[44] The court below recognized the potential for territorial restrictions but seemed to think it important (App. A, p. 19, n.12) that defendant had not argued that agreements between copyright owners and stations fixing territories of authorized reception violated the antitrust laws. The fact that defendant did not anticipate that the court would adopt a novel interpretation which explicitly sanctioned territorial division does not change the fact that the court has created a new instrument of economic control over broadcasting and reception.

By its focus on enhancing the reward of the copyright owner, to the exclusion of the primary public policy of inducing release to the public, and by its disregard of the monopolistic consequences of enlarging the limited monopoly, it has opened the way for copyright to be used to set up zones of reception and to fix territories in a way contrary to the principles announced by this Court in *U. S.* v. *Arnold Schwinn & Co.*, 388 U.S. 365 (1967), and *Adams* v. *Burke*, 84 U.S. (17 Wall.) 453, 456 (1873).[45]

5. The Erroneous Interpretation Results in an Uncertain and Enlarged "Performance" Monopoly

This novel and expansive construction of the exclusive performance right raises serious questions as to the scope of the copyright monopoly in radio and television broadcasting and reception. Since the "technical means" and equipment used are irrelevant (App. A, p. 15, n. 9), there could be infringement of the monopoly whenever simultaneous viewing by the "public" is a "result produced" by a person's actions, depending upon the "magnitude" of the person's "contribution". The scope of this vague standard of "public performance", and the potential extension of the copyright owner's restrictive power over the television reception under this construction, is, to say the least, uncertain.[46] Many persons and services contribute to

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[45] See Note, *CATV and Copyright Liability*, 80 Harv. L. Rev. 1514, 1527-29 (1967). See also discussion *infra*, pp. 45-46, on implied license.

[46] The vagueness of the rule announced by the court below raises questions for a court applying the doctrine in a given case as to whether a defendant "did far more" (App. A, p. 10), or "so much" (App. A, p. 11), or simply "more" (App. A, p. 13) than another defendant in another case might have done to "bring about the viewing and audition of plaintiff's copyrighted motion pictures" (App. A, p. 13).

or produce the "result" of a simultaneous viewing of television programs by members of the public.[47] Apparently, under the court's rationale, a person performs in public where he contributes to a number of simultaneous private performances. The court's decision poses the anomaly that although the individual homeowner could take such steps as he wishes to install an adequate antenna of his own without infringment, an entrepreneur may not supply an antenna service to a number of homeowners so that they may watch the performance in their homes.[48] Thus, the owner of any antenna serving more than a single home or a single apartment is engaged in "public performances".

By bringing cooperative antenna systems and those who would supply master antenna services to the public (and perhaps others supplying equipment and services which produce the "result" of viewing television programs) within the performance monopoly, the decision of the court below would permit the copyright proprietors to restrict and impose a toll for the reception by a substantial segment of the public.

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[47] *E.g.*, public utilities providing electric power used to operate television sets; common carrier lines between network facilities and television stations; manufacturers of television sets, and particularly various types of master antenna systems. Many apartment houses in urban areas provide a master antenna service to tenants identical to that provided by defendant's CATV systems (JA 902-904); since these do as much as a CATV system to bring about the simultaneous viewing of programs by a number of persons, presumably the apartment house "performs" the copyrighted programs "in public" under the court's decision.

[48] It should be noted that section 1(d) of the Act does not contain any requirement that a public performance be for profit, so that the profit aspect of petitioner's business is irrelevant to copyright infringement.

6. The Court Below Rejected the License Implied in Law Under the Copyright Act and the Communications Act To Receive Authorized Broadcasts

A substantial part of the court of appeals' opinion dealt with petitioner's contention that, even if its CATV systems did publicly "perform" when they received and made available television signals to subscribers, they had a license implied in law to provide their service to the public where the copyright owner had authorized the broadcast. Characterizing the question, mentioned but left open by the footnote in the *Jewell-LaSalle* decision (at p. 199, n. 5), as "one of appellate first impression", the court below ruled that defendant's CATV systems had no such license implied in law and stated that it saw "no reason to deny plaintiff the right to limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas", other than possible questions under the Federal Communications Act. (App. A, p. 20) After discussion of the Communications Act, it concluded that "at least where defendant's subscribers could not receive the licensed broadcaster's signals satisfactorily by normal antennas, the Federal Communications Act * * * was not intended to preempt the application of the Copyright Act". (App. A, p. 22)[49]

There is no authority for any restriction on reception in the language of the Communications Act. Broadcasting is defined to mean "dissemination of

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[49] The court went on to state that: "A different case might be presented, which we do not decide, if a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas . . . ." (App. A, p. 23)

radio waves intended to be received by the public".[50] There is nothing in the Act to suggest that "the public" means some arbitrary segment of the public at large determined at the will of the copyright proprietor.[51]

When the copyright owner decides to use broadcasting for exploitation of his work, and authorizes a performance of the work to the public through a broadcast, he subjects his limited monopoly to the statutory scheme of broadcasting. Under that scheme a public resource — the frequency spectrum — is licensed to broadcasters, who are obligated by their licenses to provide service to the public. Broadcasting is supported by advertising and the public pays the costs (including copyright fees) indirectly through the costs of products advertised. Since the public is intended to receive and enjoy the broadcast together with the associated advertising, and the copyright owner has been paid his royalty for the performance, he must be deemed to have licensed public viewing of the performance free from additional copyright charges. And if public reception of the authorized broadcast is legitimate, then the public should be free without risk of infringement to go to entrepreneurs (such as defendant) to secure equipment or an antenna service without being subjected to restrictions or a second charge by the copyright proprietor. *Cf. Aro Manu-*

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[50] Section 3(o) of the Federal Communications Act of 1934, as amended, 47 U.S.C. § 153(o) (1964).

[51] As was stated by the floor manager of the Federal Radio Act of 1927 (Senator Dill): "First, and most important of all, radio in the United States is free. It is so free to the listener-in that anybody anywhere may listen in to any broadcasting whatsoever * * *." 67 Cong. Rec. 12335 (1926).

facturing Company v. *Convertible Top Replacement Co.*, 377 U.S. 476, 495, 498-500 (1964).[52]

7. The Decision Below Denies the Right To Receive Authorized Broadcasts Within the Service Area of the Broadcasting Stations as Measured Under F.C.C. Regulations and Substitutes a Novel and Unworkable Test of the Public's Right To Receive

The F.C.C. has specific authority "to establish areas or zones to be served by" a station (47 U.S.C. § 303 (h)) and has adopted criteria for predicting the area within which service (acceptable reception) should be available from any given television station. These areas (referred to as Grade A and Grade B contours) are defined by the F.C.C. regulations,[53] and are relevant in considering the allowable range of broadcasting.

The "B" contour is the area at the "outer limits" of which "acceptable" reception is expected to be available for "at least" 90 per cent of the time at 50 per cent of the receiver locations. The F.C.C. has recognized the "B" contour in connection with a station's contemplated range or service area. A recent recognition is the requirement in the Commission's CATV rules that a CATV system carry upon request the signal of any station "within whose Grade B contour

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[52] Since subscribers to the CATV system specifically request and contract for the service provided, subscribers would potentially be liable for contributory infringement if the CATV systems are finally held to be direct infringers. And restrictions and charges imposed by the copyright proprietors on the CATV systems' operations will obviously affect the subscribers' viewing and the cost of the service to subscribers.

[53] See discussion *supra* p. 15.

the system is located".[54] The same Grade "B" contour is widely used in advertising by the stations to show coverage. The B contour does not mark the outer limit of reception. Acceptable reception occurs beyond the B contour with percentages of locations having acceptable reception gradually diminishing.

Clarksburg and Fairmont are, in half the ten system-station situations, within the grade B contours,[55] and in the other situations are sufficiently close to the B contour to leave no doubt that some areas would have acceptable reception. The undisputed testimony makes clear that there are such locations in both Clarksburg and Fairmont. (JA 272-277, 907-914, 1198-1200, 1230-1232, 1239). Nothing in the law of broadcasting suggests that such viewing or reception by the public is illegal or improper. On the contrary, prior to the decision below, there had been no suggestion that the public was restricted in any way in the antenna it could erect or use for reception.[56]

The court below disregarded this accepted system of determining a station's service area on the ground that the B contours are predicted areas of reception on smooth terrain and that actual reception may vary from the prediction. On these facts the court erected a negative test as to when the public's license to receive did not exist. No such license could be found,

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[54] *Second Report and Order*, ¶¶ 66-67.

[55] See discussion p. 16, *supra*.

[56] Although the F.C.C. has been granted specific authority to regulate transmitting antennas of broadcasting stations (47 U.S.C. § 303(e)), there is no provision in the Act granting authority to regulate or prescribe the nature of receiving antennas which the public may use.

the court said, where defendant's subscribers did not receive "satisfactorily" by "normal antennas" (App. A, pp. 22, 23). This test which the court proposes to substitute for the F.C.C. sanctioned "B" contour measure of service is novel, unclear and unworkable.

What is "satisfactory" reception? A quality of picture may be acceptable to some but not others. The court gave no hint as to what standard of "satisfactory" is to be adopted.

The court refers to a "normal antenna".[57] But this is also a novel concept undefined in law or regulation. In another context the court refers to a "normal rooftop antenna". But in many areas it is common to have the antenna on a pole or tree. Does this make the antenna non-normal?

Nor did the court below give any hint as to the measure of reception necessary to imply a license to receive. Is it enough if there is one person in the community who can receive on a rooftop antenna? Is it sufficient if 1% of the public can receive; 10%? 15%? What if, as in Clarksburg and Fairmont, there is reception on high ground but not in the valley?

Does the test of the court below require the public to receive all of the stations carried on the CATV system equally well? What if some stations are received in some parts of town and other stations in other parts of town?

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[57] Defendant's antennas are "normal" in the sense that they are standard antennas which could be bought in a radio store. (JA 208-209, 524-525, 880-881) While these "normal" antennas are installed on a tower or telephone poles on hills, the broadcasts are received off-the-air just as a "normal rooftop antenna" would receive; no microwave is involved.

Petitioner would emphasize that the reception in question by defendant's antennas was off-the-air. No microwave relay systems were involved. In the court below the respondent conjured up images of disruption in the television industry if the public was held to have a license-in-law to receive. It was argued that such a license for public reception would permit microwaving of programs across the nation. Of course, no microwave relay was involved in this case, but more important, the F.C.C., by its regulations now controls all use of microwave systems by CATV.[60] Supposed abuses by use of microwave to transmit signals long distances are within the regulatory jurisdiction of the F.C.C., and the F.C.C.'s regulatory scheme deals with and eliminates the dangers supposed by respondent.

Plaintiff also argued that if the public had an implied license to receive, a broadcasting station could rebroadcast other station's programs with impunity. This fear is without substance. Congress had foreseen the possibility of rebroadcasting and specifically provided in § 325(a) of the Federal Communications Act that no station may rebroadcast another station's signals without the consent of the originating station. (47 U.S.C. § 325(a)).

The court below has cast loose from the moorings provided under the Communications Act for determining the service area of a station. It has also disregarded the fact that the subscribers were included as an economic matter within the viewing audience of the stations.[61] To substitute for these standards the court

[60] 47 C.F.R. §§ 21.710-21.714, 91.557-91.561.

[61] See discussion, pp. 16, 40, *supra*.

has injected by interpretation of the Copyright Act a new test of reception never before used or referred to. Nothing in the Copyright Act or the communications law warrants this interpretation.

8. The Decision Below Conflicts With F.C.C. Regulations

The only restriction in the Communications Act on the use of public broadcasts is section 325(a) which prohibits "rebroadcasting" of a station's signal without its consent. (47 U.S.C. § 325(a)) This prohibition applies only to rebroadcasting and does not apply to CATV since it is clearly established that the operations of a community antenna system do not constitute rebroadcasting.[62]

In its *Second Report and Order* the Commission adopted a comprehensive regulatory scheme for CATV operations. Emphasizing that CATV systems "have arisen in response to public need and demand for improved television service and perform valuable public services in this respect" (*id.* ¶ 47), the Commission adopted elaborate and flexible rules to meet the problems raised by CATV operations.

As part of its regulatory scheme the Commission imposed the "carriage rule" under which CATV systems are required to carry the signals of all television stations within whose Grade B contour the system is located (*id.* ¶ 66-67, 47 C.F.R. § 74.1103(a)). The regulations also include a licensing scheme and other requirements designed by the Commission in the light of its views of national communications policy.

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[62] *In the Matter of Inquiry*, etc. F.C.C. Docket No. 12,443, *supra* at n. 35, ¶¶ 65-67.

The Commission, in contrast to the court below, views reception within the B contours as the norm to be expected, by making the compulsory carriage rule applicable to such stations. The F.C.C. stressed that under its rules "with possibly only the rarest exceptions, CATV activity which does not involve extension of a signal beyond its Grade B contour may freely continue". (*Id.* at ¶ 151).

Neither the *Second Report and Order* nor other regulations purport to restrict the public's right to use any antenna or reception equipment it chooses for reception within or outside the Grade B contour. Nor does the Commission prohibit CATV operations outside the Grade B contour. Indeed, the regulations specifically establish administrative procedures respecting CATV reception beyond the Grade B contour (*id.* ¶ 139 *et seq.*, 47 C.F.R. § 74.1107).

In five out of the ten station-system situations in the present case, the system is within the B contour of the station involved; and the system is near the B contour in the other instances. Where a system is within the B contour it would be subject to the F.C.C.'s mandatory carriage requirement. Reception of other stations would be subject to the other rules including the rules as to priorities on reception.

The court below rejected the Commission's B contour view of expected (and, under the CATV regulations, mandatory) CATV reception on the basis that the contours are "mere theoretical estimates" from which "the true coverage may vary greatly" (App. A, p. 22, n. 14, citing 47 C.F.R. § 683(a)). It instead took the view that the copyright proprietor could, despite the regulation's requirements, restrict and impose a toll for public reception by CATV systems of stations

whose B contours covered the system wherever there was no reception with "normal rooftop antennas".

In contrast to the F.C.C.'s carefully considered approach to what it regarded as a difficult regulatory problem, the court below, by a novel extension of the Copyright Act, would impose a rule of infringement liability. If sustained, this rule will upset the balance now existing under the F.C.C. regulation between CATV and the broadcasting industry. The F.C.C. has recognized that "if the copyright suits are decided adversely to the CATV industry, we may . . . have to revise our rules" *Second Report and Order,* ¶ 108. The F.C.C. has expressed the judgment that its rules

> "represent a fair balancing of the competing interests, and properly accommodate both industries and thus, the public interest 'in the larger and more effective use of radio'. (Section 303(g)) [of the Communications Act]" *Second Report and Order,* ¶ 109.

What the F.C.C. requires the CATV systems to do under its rules would, under the decision below, make the system liable for copyright infringement. Since the systems are required to carry the local stations signal—compulsory carriage in the "B" contour—the CATV is caught between requirements of the law and the copyright proprietor's demands. If the reception is an infringement, the result would be to frustrate a key element of the regulatory scheme. This result is in clear conflict with the principles of this Court's decision in *Farmers Union* v. *WDAY*, 360 U.S. 525 (1959). There the Court resolved a conflict between a statutory requirement and a civil liability by finding an implied immunity in the statute. Petitioner submits that, to avoid obvious conflict with the Commission's regulatory plan and the *WDAY* decision,

the license to receive must clearly extend at least to the B contour.

CONCLUSION

This Court is here presented with consideration of the novel question whether the copyright statutory monopoly is to be enlarged by interpretation to grant to copyright owners sweeping control over reception of broadcasts by the public or whether the statute should be construed in accordance with normal rules of construction and in accordance with the primary public policy of the Copyright Act and the Communications Act. This novel question which could, in the words of the Register of Copyrights, "affect the course of radio and television communications in this country for years to come", commends itself to a determination by this Court.

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APPENDIX